APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

Sarah Linda PARKER, et al.
Plaintiffs-Appellants,

and

Huey P. Mitchell, Appellant

v.

Judith K. ANDERSON,
Plaintiff-Appellee,

and

Bell Helicopter Company, Etc., et at.,
Defendents-Appellees

United States Court of Appeals
Fifth Circuit.*
Unit A

Feb. 18, 1982

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Appeals from the United States District Court
for the Northern Texas District of Texas

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

We review the district court's approval of a settlement of a class action suit against Bell Helicopter Company and its award of attorneys' fees. The court's approval was granted over the objection of all but one of the eleven named plaintiffs as well as over the objections of a number of class plaintiffs. Improprieties are claimed to

have occured in the settlement negotiations and the agreement is challenged as inadequate in its terms. In addition, one of the attorneys for the class appeals the amount of attorney's fees awarded to his firm. Finding neither error nor abuse of discretion in the court's approval of the settlement and setting of attorney's fees and costs, we affirm.

Facts

In March 1975, Sarah Parker and Curtis Ford filed a class action suit against Bell Helicopter Company, a division of Textron, Inc., and certain unions, alleging discrimination in employment against blacks and females, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e—2000e-17. Between 1975 and 1979 six other lawsuits brought by nine plaintiffs alleged identical discrimination by Bell; two of these suits included unions as defendents.[1] The seven suits were consolidated into the instant proceeding.

Following consolidation, because the attorneys were unable to agree to an apportionment of responsibilities, the district court designated Howard Specter as lead counsel and Huey Mitchell and James Barber as associate class counsel, and assigned them concomitant duties. On April 21, 1978, the district court conditionally certified the litigation as a class action under Rule 23(b)(2) of the Federal Rules of Civil Proceedure. Extensive, reciprocal discovery of the merits began in October 1978 and continued until February 1980.

Trial was scheduled for March 3, 1980. At the pretrial conference on February 6, 1980, it appeared that a settlement might be possible; the court urged counsel to make a good faith effort to

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[1]Subsequently, the claims against the unions were severed. They are still pending.

reach an agreement. On February 29, 1980, counsel reached a tentative agreement and moved jointly for a continuance.[2] The motion was granted and the court instructed counsel to inform the court on or before April 1, 1980, whether a complete settlement could be achieved.

During March 1980, class counsel met with the various named plaintiffs and discussed the tentative settlement proposal. Each of the eleven named plaintiffs authorized their counsel to note their approval of the class settlement, subject to Bell's acceptance of their individual demands which included a demand of $100,000 for one plaintiff, $84,000 for another, and guarantees of promotion to specific jobs for others. Bell countered with an offer of $1,500 each for ten of the named plaintiffs and $2,500 plus a future promotion for the eleventh.

On March 26, 1980, associate class counsel Barber met with all named plaintiffs to discuss the suit and proposed settlement. A discussion of the evidence, particularly the statistics plaintiffs were relying on, was planned. No serious discussion of the lawsuit was possible; plaintiffs were interested primarily in discussing their personal monetary demands. Apparently convinced that Bell's offer to them was too little, nine of the eleven plaintiffs expressed

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[2]The motion reads:

> As previously reported to the Court infomally, extensive good faith negotiations have been taking place between lead counsel for the Plaintiff class and counsel for the Employer-Defendant. These negotiations have now reached the point that substantial progress has been made, and counsel believe a reasonable probability exists that a full settlement can be reached.
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> Counsel, therefore, jointly requests a continuance for a status conference on April 1, 1980. By that date counsel believe that they will be in a position to inform the Court either that a settlement has been reached and concluded and in fact is ready for presentation to the Court or that a settlement is impossible. Counsel will extend every effort to the end that a settlement be reached.

opposition to the settlement.[3]

On March 29, 1980, the attorneys for the parties approved a proposed Stipulation of Compromise and Agreement which embodied 18 of the 19 points contained in the tentative agreement confected on February 29, 1980. The proposal required Bell to deposit $1,250,000 in an interest bearing account to be distributed to the class members when and as directed by the court.[4] Certain affirmative relief measures projected to cost Bell approximately $1,000,000 to implement and maintain, were included. The proposal was made applicable only to the members of the class; Bell agreed to sever the individual claims of the named plaintiffs. Those claims are still pending.

On April 8, 1980, lead counsel Specter met with the named plaintiffs, intending to discuss the proposed settlement and his analysis of the stregnths and weaknesses of the evidentiary base of their suit. The effort was futile; the plaintiffs focused on and voiced disagreement with Bell's counter to their individual claims. Specter offered to meet separately with each plaintiff. No one accepted his invitation.

On April 10, 1980, several plaintiffs moved to enroll Charles Padorr as their attorney for purposes of objecting to the settlement. By June 21, 1980, all plaintiffs had dismissed their original attorneys except the non-objecting Judith Anderson, who continued to be represented by Mitchell. On April 18, 1980, the proposed-

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[3]The trial court capsulated the evidence about the meeting as follows:

> Angry and offended at what seemed to them small counteroffers, and fortified with a case of beer, the plaintiffs were ill disposed to listen to any explanation of the deficiencies of the statistical case against Bell. Posturing and wild talk took the place of reasoned analysis. At the close of the meeting, the plaintiffs voted to "reject" the settlement.

[4]Bell had made an anticipatory deposit on March 3, 1980.

ment was filed along with a motion for preliminary approval.

On May 29, 1980, the district court defined a subclass of "objectors" and appointed Padorr as their counsel with authority to conduct discovery into the propriety of the settlement. On July 25, 1980, the court preliminarily approved the settlement for purposes of notification of the class. After considering filings from all parties, including the objectors, the court approved forms of notice for dissemination to the class, direct and by publication. This notice advised that a hearing would be conducted to examine the fairness and adequacy of the settlement.

After being continued once, the hearing on the proposed settlement commenced on October 16, 1980. For two days the court received evidence from the proponents and opponents of the proposed settlement. The hearing extended into a third day, when the court received evidence on the issue of fees for the class attorneys.

On March 11, 1981, the court filed a comprehensive Memorandum Opinion and Order which found the settlement to be fair and reasonable. The court also assessed fees for the various class attorneys and allowed their recovery costs incurred in preparing the matter for trial. On April 10, 1981, the court amended the earlier order to correct clerical errors, to effect one substantive change, and to provide for post-settlement attorney's fees and apportionment of interest accruing on the deposit. This appeal followed.

Objectors maintained that the settlement should be rejected because (1) the terms are not fair and reasonable, (2) the class attorney did not properly represent the class in negotiations, and (3) the payment of attorneys' fees out of the class settlement fund creates and impermissible conflict of interest. Mitchell appeals his award of attorney's fees.

I. *Fairness and Adequacy of the Settlement*

Rule 23(e) requires court approval of compromise settlements of class actions, but it is silent as to the standard that is to be applied. Nonetheless, the rubric is now well established that the court will not approve a settlement unless it is found to be fair, adequate, and reasonable. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977). In determining the adequacy and reasonableness of the proposed settlement, the court does not adjudicate the dispute, for as we noted in *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971): "[i]n examining a proposed compromise ... the court does not try the case. The very purpose of the compromise it to avoid the delay and expense of such a trial." In evaluating settlement proposals, six factors should be considered: (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of the discovery completed; (4) the factual and legal obstacles prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinion of the participants, including class counsel, class representative, and the absent class members. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020, 59 L. Ed.2d 74 (1979).

Our appellate review of the district court's approval of a settlement is limited; an approved settlement will not be upset unless the court clearly abused its discretion.[5] *Young v. Katz*, 447 F.2d 431,

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[5]In a recent opinion affirming the approval of a class action settlement, the Ninth Circuit articulated the role of the trial court and the need to afford it broad discretion:

Class actions vary widely in their circumstances, and the procedural protec-

(continued)

432 (5th Cir. 1971). Similar to the function of the trial court, our limited review rule is a product of the strong judicial policy favoring the resolution of disputes through settlement. *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980).

In deciding whether a clear abuse of discretion has occured, we share the view of our colleagues of the Second, Fourth and Eighth Circuits that, absent fraud or collusion, the most important factor is the probability of the plaintiffs' success on the merits. *See, e.g., Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976); *Grunin v. Internation House of Pancakes*, 513 F.2d 114 (8th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("If the settlement offer was grossly inadequate ... it can be inadequate only in light of the stregnth of the case presented by the plaintiffs.")

In the case at bar, the court approved a settlement which provided, because of the accrued interest, a cash recovery exceeding $1,440,000 and 15 specifications of employment enhancement which the court concluded would cost Bell approximately $1,000,000 to implement and maintain. The district court's detailed findings and conclusions, which include a thorough history and analysis of the litigation, reflect a careful evaluation of the settlement in light of the six factors set forth above.

After reviewing the entire settlement and pretrial record, the court concluded that the plaintiffs had "only a marginal chance of

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tions and judicial responsibilities are necessarily only generally defined. Broad discretion is granted to the trial judge, enabling him or her to respond fluidly to the varying needs of particular cases. Therefore, although certain factors must be considered and certain proceedures must be complied with, much of the judicial oversight of class actions is in the form of the sound discretion of the District Court.

Mendoza v. United States, 623 F.2d 1338, 1334 (9th Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981) (citations omitted).

recovery in the five million dollar range," and that even if they were successful in recovering a judgment in the more realistic range of three to five million dollars an appeal raising serious issues was likely. Review and analysis of the plaintiffs' affidavits, testimony, and the opinion of their expert statistician, impressed the district court that substantial weaknesses existed in their case. The trial judge noted "a significant risk of failure to show liability on the major backpay issues," and that the issues concerning the validity of Bell's education and experience requirements for hundreds of different jobs would be disputed hotly at trial, with sharply conflicting testimony about the statistical evidence, presenting an "all or nothing confrontation of unpredictable outcome." The judge also saw difficulties with the issue of certifying a class that included unhired applicants and Bell's facility in Amarillo. Problems were presented by the question of showing discriminatory intent for Title VII claims not based on adverse impact, and the validity of the causes of action based on affirmative action plans. Weighed against this background the court concluded that the monetary award and the provision for affirmative relief constitued a fair, reasonable, and adequate settlement.[6]

We are not persuaded that the trial court erred either in its assesment of the probabilities of success or the range of recovery. Objectors offered no evidence at the settlement hearing concerning these issues. They were represented the by able and experi-

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[6]Even if the trial judge had found a comfortable probability that plaintiffs would have recovered $5,000,000, that factor would not mandate that the order approving the settlement be vacated. We agree with the comments by the Second Circuit when it confirmed the approval of a settlement which constitued only 12% of potential recovery in *City of Detroit v. Grinnell Corp.*: "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." 495 F.2d at 455. The court continued in a footnote: "In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at n.2.

enced counsel who had been empowered to conduct all necessary discovery and allowed adequate time to do so.[7] We find no basis in this record for the contention that the trial court abused its discretion in finding this settlement fair and reasonable.[8]

II. *Fairness and Adequacy of Representation*

Objectors contend that the attorneys did not represent the class fairly and adequately during negotiations. They contend that counsel failed to consult with them, withheld certain information, and misrepresented material matters. The record does not support any of these assertions.

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[7]Conclusion 16 of the trial court's opinion reads, in pertinent part:

> Despite their access to the file and to compulsory discovery, objectors adduced no evidence of any weight to rebut proponents' *prima facie* showing that the class case was not strong enough to demand larger monetary awards or additional affirmative relief.

[8]Objectors challenge the 15 affirmative relief provisions, nine because they do not go far enough and six because they duplicate existing programs. We reject the challenge as to the nine for the reasons discussed in text. The trial judge concluded that in the arms length negotiations, the strength of plaintiffs' case would not support the insistence of a more favorable result. We are not prepared to disturb this judgment call as an abuse of discretion.

As to the contention that six provisions are duplicative of existing programs, we simply do not agree. As an example, objectors insist that the provision requiring Bell to publicize the existence and purposes of its "Employee Skills Profile and Questionnaire," is duplicative and therefore meaningless. This document, when used, lists the skills, education, and work experience of Bell employees. This provision requires Bell to provide personnel to encourage and assit both old and new employees to complete and update these profiles. The record reflects that the profile program was available previously but it was not publicized and it was not implemented. The proposed program would be structured to insure utilization, to the advantage of employees. In this context, we do not find this procedure duplicative. Nor do we find the others defective for similar reasons.

This inquiry must be placed in proper perspective. Objectors' personal claims were not before the district court and are not before us; they were severed and are still pending. Rather, the objectors stand before us as representatives of the absentee class members. The question presented by this appeal is whether the class counsel provided fair and adequate legal representation to the class as a whole. Necessarily, much of what counsel does for the class is by and through the class representatives, but that is neither the ultimate nor the key determinant. The compelling obligation of class counsel in class action litigation is to the group which makes up the class. Counsel must be aware of and motivated by that which is in the maximum best interests of the class considered as a unit.

The duty owed to the client sharply distinguishes litigation on behalf of one or more individuals and litigation on behalf of a class. Objectors emphasize the duty of counsel in non-class litigation. The prevailing principles in that situation cannot be imported wholesale into a class action setting. The fairness and adequacy of counsel's performance cannot be gauged in terms of the representation of the named plaintiffs. In addressing this point in our recent decision of *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981), we stated:

> Appellants' argument that the settlement cannot be applied to them because they did not authorize their attorney ... to settle the case or otherwise consent to the settlement is also easily disposed of. Because the "client" in a class action consists of numerous unnamed class members as well as the representatives, and because "[t]he class itself often speaks in several voices ..., it may be impossible for the class attorney to do more than act in what he believes to be the best interest of the class as a whole ..." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978).

The courts have recognized that the duty owed by class counsel is not dependent on the special desires of the named plaintiffs. It has been held that agreement of the named plaintiffs is not essential to approval of a settlement which the trial court finds to be fair and reasonable. "Because of the unique nature of the attorney-client relationship in a class action, the cases cited by appellants holding that an attorney cannot settle his individual client's case without the authorization of the client are simply inapplicable." *Kincade*, 635 F.2d at 508; *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 n.19 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976) ("Appellants do not argue, nor may they under the authorities, that the assent of the class plaintiffs is essential to the settlement, provided the trial court finds it fair and reasonable."); *Bryan v. Pittsburgh Plate Glass Co.*, 493 F.2d 799 (3d Cir.), *cert. denied*, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974); *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64 (S.D.N.Y.1976); *Purcell v. Keane*, 54 F.R.D. 455 (E.D.Pa. 1972). *Accord, Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied.* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). The rationale implicit in these decisions is sound: the named plaintiffs should not be permitted to hold the absentee class hostage by refusing to assent to an otherwise fair and adequate settlement in order to secure their individual demands. The trial court was not impressed favorably by the motivation of the objectors, finding as a fact that: "Plaintiff-objectors opposed the settlement in bad faith, primarily to gain leverage against Bell at exorbitant figures."

We measure class counsel's performance of the duty to represent the class fairly and adequately as we gauge the fairness and adequacy of the settlement. It will follow generally that an attorney who secures and submits a fair and adequate settlement has represented the client class fairly and adequately. In this instance, we affirm the trial judge's findings as to the settlement and necessarily reject the contention that the attorneys' performance in confecting the settlement was inadequate.

Objectors contend that counsel did not consult with them in a meaningful way and that they failed to disclose some matters and misrepresented others. These allegations are contrary to factural findings by the trial judge and are not supported by the record.

Consultation

Objectors complain of the inadequacy of contacts between counsel and the class members, especially as regards discussions of relative strengths and weaknesses of their case. Objectors point to the paucity of contact between counsel and the class representatives, pointing particularly to the five month period immediately preceding the February 29, 1980, tentative accord. The record does not support this assertion.

We note over 30 contacts between a member of Specter's staff and the class representatives during that period. In addition, the record reflects substantial contacts between class cousel and the representatives during March and April of 1980. During that period, the class attorneys advised the representatives of the terms of the proposed settlement, evaluated the evidentiary bases for the case, held meetings to discuss the settlement, and attempted to negotiate a monetary increase for some of the individual representatives.[9] Objectors suggest that these contacts are immaterial, con-

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[9]For example, in a letter to plaintiff Mackey, dated March 25, 1980, lead counsel devoted approximately four pages to a detailed evaluation of the strengths and weakensses of the case. In summarizing his purpose for writing he stated: "I want you to have a clear understanding of the risks which you are running before you decide what course to take and whether to seek to settle or take your chances in court." A similar letter was sent to plaintiff Odom.

In addition, on at least two occasions, it was the named plaintiffs that refused to accept counseling and evaluations offered by class counsel. After the February 29 letter but before the final settlement agreement, associate counsel Barber met with plaintiffs to discuss the case. Instead of rational discussion, he was confronted with hostility and anger. After the March 28 agreement, but before the settlement hearing, lead counsel offered to discuss settlement with plaintiffs individually. The invitation went begging.

tending that the February 29 letter was, in effect, the final settlement agreement. This objection is not well taken. As appellees point out, the tentative agreement was conditional, incomplete, and subject to approval, including the ultimate approval of the court.

The trial court reached the following conclusions: "Counsel consulted regularly and frequently with the class representatives throughout the case"; during March "all named plaintiffs consulted their attorneys about the class action settlement and authorized them to convey binding offers to Bell and to approve class settlement on their behalf if accepted," ...; and "lead counsel behaved appropriately in negotiating the tentative settlement as spokesman for the class, immediately advising the named plaintiffs and associate counsel of its terms by letter, and ascertaining the named plaintiffs' reaction to the settlement before presenting it to the court." We perceive no error in these findings.

Disclosure

Objectors contend the class attorneys failed to inform the district judge that all but one of the named plaintiffs objected to the settlement agreement. Judge Mahon, however, concluded that "it would be a gross distortion of the events to suggest that counsel attempted to conceal or even delay notifying the court of the plaintiff-objectors dissent once it became irreconcilable." In addition, in his May 27, 1980 order, the judge observed that by April 10, 1980, four of the objectors were dissatisfied with the settlement and had taken steps to discharge Mitchell as their attorney. Obviously, the trial judge is in the best position to know whether he was or was not informed of the opposition to the settlement. His finding in this regard is affirmed.

Misrepresentation

The letter of February 29, outlining the terms of the tentative agreement, contained no reference to a time limit for the injunctive

relief against Bell. The final agreement of March 28 contained a provision limiting injunctive relief to four years. Objectors claim that the failure of class counsel to inform them of this modification was misrepresentation. To support their contention, they point to the March 25 letter from Spector to Mackey explaining the terms of the settlement; that letter did not advise of the limitation.

Specter testified at the settlement hearing that any provision in the final agreement that was not in the February 29 letter was agreed to on March 28. The four year term for injunctive relief is one of those provisions. This testimony is not controverted. Since counsel was not aware of this provision during the conferences and communications with the plaintiffs in March 1980, his failure to inform them of this element cannot constitute misrepresentation. We find no merit in this contention.

Attorney's Fees

Objectors contend the settlement should be set aside because the manner in which the attorney's fees were awarded created an impermissible confict of interest. We agree with objectors that awards of attorneys' fees in the class action context present a potential for abuse, but we find no impropriety in the instant case.

The fees of class action attorneys have been paid historically out of the fruits of their labors. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The amount of the attorneys' fees must be approved by the district court at the settlement hearing required under Rule 53(e). A full hearing is required.[10] The trial judge has a responsibility to

[10] A full hearing is one in which notice is given to the class of the proposed attorneys' fees, counsel offers relevent evidence, and is available for cross-examination, and objectors have an opportunity to be heard. *Foster v. Boise-Cascade, Inc.*, 577 F.2d 335 (5th Cir. 1978), *affirming* 420 F.Supp. 674 (S.D.Tex.1976); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1971).

assess the reasonableness of the attorneys' fees in light of the standards enunciated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974),[11] and to enter findings of fact and conclusions of law setting out the basis for the fee award. *Piambino v. Bailey*, 610 F.2d 1036 (5th Cir. 1980). *See Norwood v. Harrison*, 518 (5th Cir. 1978). When these procedures are complied with, our review of a trial court's award is confined to determining whether the trial court abused its discretion.

In the present case, the settlement agreement provided that "all Plaintiffs' attorneys' fees, expenses, and costs awarded by the Court shall be paid from the Settlement Fund" and that Bell "would have no further liability as to fees and costs than from the Settlement Fund except with respect to fees earned or costs incurred subsequent to the date of execution of this Stipulation." The agreement did not purport to set the amount of attorneys' fees. Instead, the third day of the settlement hearing was devoted to the question of attorneys' fees. That the trial court set the fees in light of the *Johnson* standards is evident from its opinion which explains in detail the methodology and basis for the various awards.[12] We find no abuse of discretion in the setting of attorneys' fees.

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[11]The *Johnson* factors involved are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitation imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the political "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19. In *Piambino v. Bailey*, we added two additional factors: the difficulty of the case and the uncertainty of the recovery.

[12]The fact that one of the class attorneys is an appellant, contesting the amount of his fees, attests to the careful and exacting manner in which the trial court analyzed the fee petitions and determined the amounts to award.

The appellants urge us to find that regardless of the care taken by the trial judge, a settlement providing for attorneys' fees payable out of the settlement fund creates an impermissible conflict of interest, citing *Piambino v. Bailey* and *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977). Their reliance on these cases is misplaced.

In *Prandini*, the settlement agreement provided for payment of a certain sum to the class and another set sum to counsel. The two separate funds were negotiated simultaneously and the court recognized the inherent conflict. Similarly, in *Piambino*, the settlement agreement provided for the payment of a specific amount of attorneys' fees out of the settlement fund. The district court did not make an independent evaluation of the reasonableness of the fees, stating that is was:

> not being asked to set a reasonable attorneys' fee in conjunction with the instant settlement; rather the court is being presented with a proposed settlement, agreed to by all parties and unopposed by the class, which incorporated an award of attorneys' fees in the amount of $750,000.00 as a vital part of the settlement.

610 F.2d at 1328. We held that the district court improperly abdicated its responsibility to assess the reasonableness of the attorneys' fees and reversed its approval of the settlement.

Neither situation is presented in the instant case. The amount of the attorneys' fees was left entirely to the discretion of the court. The evil feared in some settlements—unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client—can best be met by a careful district judge, sensitive to the problem, properly evaluating the adequacy of the settlement for the class and determining and setting a reasonable attorney's fee in light of *Johnson* standards. We find no abuse of

discretion in the present case and affirm the award of attorneys' fees and costs recoveries to the attorneys.

Huey Mitchell's Fees

Mitchell requested $72,235.20 in fees in fees; the trial court awarded $21,980.50. In arriving at this amount the trial court obviously considered the *Johnson* criteria. Mitchell's fee petition presented a particular problem. His fee request was not documented properly. It did not show that the fees were for services that benefited the class, a requirement necessarily imposed on class counsel. Services rendered for the individual claims of named plaintiffs or claims against the unions, all of which were severed and are pending, could not be compensated from the funds belonging to the class. Further, Mr. Mitchell's petition was vague and unclear. Even after he was given an opportunity to revise and clarify his petition, Mitchell failed to show how many hours he contended were compensable under the directives imposed by the trial court on all of the class attorneys. Following Mitchell's failure to adduce a definitive petition, the trial court gleaned the record and found 344 hours to be compensable. Mitchell was awarded sixty-five dollars per hour for his services. The time for the other associates in Mitchell's firm was compensated at five dollars per hour, since court concluded that these services were performed by clerks.

Under these circumstances, an affirmance is mandated. As we held in *Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1371 (5th Cir. 1979):

> The burden rests on the party seeking an attorney's fee award to file a fee application and proffer proof going to the *Johnson* guidelines before the trial court. While a trial court should adhere to the *Johnson* standards, it is not to be expected, as plaintiff suggests, that the trial court must take the initiative in ferreting out the relevant facts.

The burden place on the trial court by the inadequate submission was recognized by Mitchell in his testimony at the settlement hearing. Mitchell conceded that no one could determine definitively how much time he had spent on behalf of the class by reviewing the submissions he made in his fee petition. We can do no better job than the trial judge. Indeed, he is in a superior position to judge a fair fee award. He presided over this case, observing the performance of counsel. In this instance, with an admittedly inadequate record, we are doubly chary of rejecting the trial court's findings. We discern no abuse of discretion.

The judgment of the district court is AFFIRMED in all respects.

APPENDIX B

Memorandum Opinion And Order of the United States District Court for the Northern District of Texas, Fort Worth Division

Dated March 10, 1981

SARAH LINDA PARKER, ET AL., Individually and on Behalf Of All Other Persons Similarly Situated	§	
VS.	§	CIVIL ACTION NO. CA4-75-61-E (Conditionally Consolidated)
BELL HELICOPTER COMPANY, A Subsidiary Division of TEXTRON, INC., ET AL	§	

MEMORANDUM OPINION AND ORDER

On April 21, 1980, the parties filed with the Court their Stipulation of Settlement and Compromise of the class claims. After a full hearing on the settlement and the amount of a reasonable attorney's fee, the Court holds that the proposed settlement is a fair and adequate compromise of the class claims.

I. Prevailing Parties.

A named plaintiff representative who achieves benefits from the class through settlement of the same type as could have been obtained by trial is a prevailing party for purposed of 42 U.S.C. § 1988 *Maher v. Gagne*, ____U.S.____, 100 S.Ct. 2570 (1980). However, where a variety of distinct issues and/or defendants are joined in one action and it is apparent that plaintiffs did not prevail in any arguable way upon certain of those claims, the court may in its discretion eliminate the time and expenses devoted to the unsuccessful claims from its award of reasonable attorney's fees.

Jones v. Diamond, 594 F.2d 997, 1026 (5th Cir. 1979) *aff'd en banc* No. 78-1289 slip op. 3729, 3750 (January 29, 1981). Although this procedure serves primarily to alleviate untoward expense on defendants in ordinary lawsuits, it is a fiduciary concern in the context of a class action where the failure to eliminate collateral claims may permit the representative to exact contributions from the class to finance his own unique recovery in which the class will not share.

The Court holds that the named plaintiffs are not yet prevailing parties on their unresolved individual claims against Bell, and/or the Unions.[1] Nor can the named plaintiffs claim to be prevailing parties in their status as objectors under the *Jones v. Diamond* standard. No fees or expenses attributable solely to these matters may be paid from the settlement fund belonging to the class. Plaintiffs may renew their petitions for the balance of their fees and expenses if and when they prevail upon their severed individual claims.

II. Reasonable Attorney's Fees.

The Court finds that $345,094.50 plus expenses of $157,693.15 is a reasonable attorney's fee to be paid from the settlement fund and distributed as set out in Attachment A. In calculating these fees and expenses, the Court adopted what is essentially a "lodestar" approach applying the criteria prescribed in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *See, Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 583 n. 15 (5th Cir. 1980).

A. Time and Expenses.

1. Lead and Associate Counsel. On April 19, 1977, this Court

[1] See procedural summary of case in Section II.A., infra, p. 13.

entered its pre-trial order designating Howard Specter as lead counsel for the class and laying out his responsibilities as opposed to those of associate counsel. For convenience and clarity, the pertinent portions from Section III of that order are recited here:

> The Court is sorely disappointed that counsel for the various individual plaintiffs were unable to agree among themselves as to who should be lead counsel for the conditionally consolidated and certified class. The Court is of the opinion that this is a matter better left to the discretion of the various parties and attorneys than to the Court. Nevertheless, where counsel cannot agree, it is incumbent upon the Court ... to appoint a single lead counsel.
>
> [A]fter careful consideration of the briefs and presentations of contending counsel, the Court is of the opinion that it should designate Mr. Specter as lead counsel.
>
> Since Mr. Specter's law offices are in Pittsburgh, Pennsylvania, the Court is of the opinion that he should be required to file a notice designating a local associate lead counsel, whose duties will include conveying information and documents between the Court, local counsel, and the parties, on one hand, and Mr. Specter on the other. The local associate lead counsel must also be available to stand in for Mr. Specter as lead counsel should the exigencies of some future situation so require.
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> * * *
>
> Lead counsel shall have the primary responsibility to initiate and conduct discovery, to prepare and file notices, motions and briefs, and to act as spokesperson for plaintiffs at any future pretrial confrences. Lead counsel is responsible for coordinating the efforts of all attorneys of record in order to minimize duplication and to accommodate reasonable scheduling of matters before the Court. Lead counsel is res-

ponsible for providing fair representation to all members of the conditionally certified and consolidated class. Lead counsel may, with notice to the Court and/or counsel for defendant Bell Helicopter where prudent, delegate responsibility to other counsel.

* * *

All counsel of record for plaintiffs in the consolidated actions other than lead counsel and associate lead counsel shall be deemed associate counsel for plaintiffs.

Associate counsel retain the responsibility of insuring that the named plaintiffs that they have undertaken to represent do indeed receive fair representation. Associate counsel may, after notice to lead counsel, speak for their individual named plaintiffs, file supplemental memoranda, and conduct non-duplicative supplemental discovery, to or positions of their individual named plaintiffs requires such supplementation.

Under the Court's division of labor, associate counsel had only limited responsibility to the class. Unless their efforts were enlisted on behalf of the class, their primary obligation was to see that the named plaintiffs' separate interests were not disregarded.

The Court has generally allowed time expended by all counsel on non-union matters prior to the appointment of lead counsel. Although all associate counsel uniformly ignored the Court's instruction to attach a certificate to any documents filed by them stating whether lead counsel had requested, approved, or disapproved its filing, it is apparent from a review of the file, the correspondence, and attorney's fee petitions that lead counsel did delegate class-related projects to associate counsel on a number of occasions. The Court has allowed time and expenses incurred by associate counsel after April 19, 1977: (1) in performing the class-related projects delegated to them by lead counsel; (2) in attending the joint strategy meetings held in Los Angeles and Pittsburgh; (3)

in attending the class certification hearing held July 25, 1977; (4) in discussing the settlement agreement with their individual clients and attending the settlement hearing; and (5) in preparing their fee petitions. The Court has disallowed time and expenses incurred by associate counsel (1) in conducting discovery solely on individual plaintiffs' claims against Bell or the Unions; (2) in monitoring the case by reviewing correspondence and documents filed by other counsel or by attending depositions or hearings also attended by lead counsel Specter; and (3) in pursuing lead counsel status. The Court makes no judgment as to whether the fees disallowed here were reasonable and necessary in the pursuit of the severed individual claims.

2. Associate Lead Counsel. Fort Worth attorney Wallace Craig was designated associate lead counsel as required by the Court's Order of April 19, 1977. His primary function as local counsel and coordinator for Mr. Specter was substantially different from that of other associate counsel and merits somewhat different treatment for fee purposes. Time spent by Mr. Craig in hearings or in many of the dispositions that were also attended by Mr. Specter is disallowed as duplicated effort; however, time spent monitoring the file and attending depositions of the named plaintiffs has been allowed since Mr. Craig was instucted by the Court to be prepared to appear in Mr. Specter's stead if it became necessary. As a result of Mr. Craig's peculiar role, certain costs that are ordinarily treated as part of an attorney's overhead were greatly inflated without a corresponding increase in the number of professional hours worked, e.g., local milage and clerical services. These requested expenses have been allowed with minor exceptions because the Court is satisfied that they were necessitated by the peculiarities of this action and could not realistically be recouped as overhead through professional fees.

3. Experts and Nonprofessionals. The services of experts and consultants have been allowed as expenses of suit without cavil. The fees charged for the service of paralegals, law clerks and clerical personnel, however, are a matter of some difficulty to the

Court. Although delegation of the more mundane tasks of litigation to law clerks and attorney of lesser experience at a commensurately lower hourly charge has long been one of the first principles of an efficient law practice, the modern trend toward utilitizing paraprofessionals carries some potential for abuse. There are doubtless many administrative duties required by the litigation that do not call for the expert legal judgment of an attorney; and few sensible clients would balk at the substitution of a qualified paraprofessional in those functions if it resulted in lower costs. However, there are many essentially clerical tasks, such as typing, filing, copying, local deliveries, etc., for which no professional or paraprofessional fees can be justified, even thought there are necessary to the litigation and are enhanced by some specialized mechanical skills or familiarity with the case. These word processing functions are part of an attorney's overhead and no hourly charges for performing them have been a allowed except in the case of Mr. Craig.[3]

4. Documentation of Fees and Expenses. The Court required the attorneys to support their fee petitions with contemporaneous time records showing the number of hours expended, the subject matter, the date performed, and the person performing the work. Where the affidavits or summaries conflicted with the documentation, the Court relied upon the documentation. Illegible, incomplete or ambiguous time and charge slips were eliminated unless the uncertainty could be cured by reference to the docket sheet or correspondence. The Court did not insist upon receipts or even accounting ledgers to document expenses so long as they were itemized and adequately described. Long distance charges for

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[2]Although courts should be alert to the possibility of unauthorized practice of law by paraprofessionals, there is no indication in this case that lay employees were attempting to exercise legal judgment.

[3]Mr. Craig was allowed $5/hr. for deliveries and for extraordinary copying time, i.e., time in excess of one hour per project. Time spent at the Clerk's office tabulating class correspondence was allowed at the rate of $10 per hour.

which no callee was indicated were disallowed.[4]

5. Fee Petitions of Mackey and Odom. The fee petitions filed by plaintiffs Mackey and Odom seeking reimbursement from the fund for tuition, mileage, investigations, "consultant's fee," snacks and like expenses were categorically denied. Prevailing parties are entitled only to an award of "reasonable attorney's fees" under 42 U.S.C. § 1920. Neither of these provisions supports a general right of reimbursement for a plaintiff's time and personal, out-of-pocket expenses, whether or not the plaintiff purports to represent himself.

6. Number of Hours Expended. The court finds that the total number of hours expended in pursuit of class issues was reasonable and necessary given the nature and procedural history of the case. Plaintiffs alleged a state-wide class that had been subject to both disparate impact and purposeful discrimination over a period of almost ten years. Consolidation of the separate actions, which consumed a considerable block of time, brought eleven fairly diverse plaintiffs into the case and permitted certification of an across-the-board class that spanned a number of potentially conflicting subclasses. Commensurate with the huge back pay award that might be obtained, discovery was aggressive and thorough. Faced with staggering potential liability as well as the sheer expense and inconvenience of production, and alarmed at the confidential nature of certain information sought by plaintiffs, defendant Bell stoutly resisted much of the discovery and repeatedly sought to narrow the broad class.[5]

Despite the number of plaintiffs and attorneys, this has been an exceptionally well-managed case from the entry of the April 19, 1977, pre-trial order to the present date. Based upon recollection

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[4]Mr. Mitchell was pointedly cross-examined on the coherence and accuracy of his fee petition at the settlement hearing. He later revised his petition, greatly reducing the expenses claimed. However, a tally of the time and charge slips revealed a sizable error in the fee request as well.

[5]The objections posed by defendant Bell were hardly frivolous. See the discussion of rates in Section I.B.

corroborated by a review of the volumnous file, the Court's overall impression is that the 3,405.75 hours devoted by the attorneys to class issues reflect little wasted effort.

7. Expenses. The Court has examined the attorneys' itemizations of their out-of-pocket expenses and finds that their outlays for travel, long distance telephone calls, copying, deposition transcripts, expert's fees, and other miscellaneous expenses were reasonable and necessary given the potential recovery and the preparation required for major class litigation.

B. Rates.

The attorneys varied not only in their expertise but in the degree to which they actually bore the responsibility for the case. Few of the attorneys have requested an hourly rate that is much divergent from the Court's assessment of their objective qualifications and, more importantly, of their actual display of skill, maturity, diligence, efficiency, and those other traits that credentials do not always assure. However, the time sheets go back as far as 1974, and the requested rates obviously represent the price that such services would draw in 1979 and 1980. Rather than determine rates graduated by year, the Court has used an average rate for each attorney intended to be a composite of his expertise and role as well as the general fact that the fees were contingent and, therefore involved an element of risk; the actual length of time between performance of service and collection; the extent to which the attorney financed costs; the specialization required; the extent to which the case precluded other employment; and the difficulty of the issues with which that attorney was presented.

1. Howard Specter. The Court finds that $125/hr. is a reasonable rate for plaintiffs' lead counsel. Mr. Specter brought to plaintiffs' side an expert's understanding of major civil rights and class litigation as well as the financial resources and sophistication of his firm, counter-balancing the formidable defense attorneys retained by defendant Bell. Mr. Specter designed and very ably implemented the plaintiffs' ambitious discovery program. Throughout the

case, difficult and substantial questions were raised by defendant about the proper scope of Title VII discovery and the elusive requirements of Rule 23a, for which the law provided guidance but few answers.[6] With one exception, these issues were researched and argued by Mr. Specter or under his immediate direction. The general quality of the work produced under his supervision was excellent.

Mr. Specter made his appearance in early 1977. Since that time he has devoted 20% of his time to this case alone and his firm has advanced well in excess of $120,000.00 in expenses.

2. Michael Buchwach. The Court finds that $75/hour is more than reasonable for Mr. Buchwach's contribution. Mr. Buchwach was Howard Specter's principle associate beginning in early 1979. It is apparent that he had a major strategic role, that he performed much of the very fine research in support of plaintiffs' positions, and that he was active in the preparation and analysis of discovery.

3. Beth Troiano. The Court finds that $50/hour is a reasonable basic rate for work performed in 1979 by an attorney with 2-3 years experience in private practice and with previous experience as a federal law clerk.

4. Duncan MacCallum. The Court finds that $40/hour is a reasonable basic rate for research performed in 1980 by an attorney with less than a year's experience.

5. Wallace Craig. The Court finds that $75/hour is a reasonable rate for Mr. Craig's services. Although Mr. Craig is not a specialist in major class action litigation, he has considerable trial experience in both state and federal courts. He was designated associate lead counsel by Mr. Specter in 1977 and has served in that capacity to the Court's and Mr. Specter's satisfaction. The

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[6] Although the elements of Title VII and 42 U.S.C. § 1981 are fairly clear and well settled where individual actions are involved, the class action is a peculiar vehicle fraught with some of the most abstruse and logically subtle distinctions known to the law. See, e.g., *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166 (1980); *United States Parole Commission v. Geraghty*, 445 U.S. 389, 100 S.Ct. 1202 (1980).

Court notes that the $7,000 in expenses carried by Mr. Craig is a sizable burden for a small law office.

6. Jim Barber. The Court finds that $85/hour is a reasonable rate for Mr. Barber's services. Mr. Barber has had a great deal of experience in civil rights and class litigation and has been appointed lead counsel in several race and sex discrimination cases. Mr. Barber appeared in this action in 1977 representing plaintiff Dorothy Spears and was responsible for preparation of the plaintiffs' principle post-hearing brief on certification, as well as plaintiffs' brief filed November 28, 1978, opposing defendant's motion for a permanent injunction. These projects assigned to him by lead counsel Specter drew heavily upon his experience and accumulated knowledge of the area. Mr. Barber was also active in presenting the settlement proposal to the named plaintiffs as a group and in attempting to dissuade them from their self-interested opposition to the proposal. Mr. Barber's firm did not carry a significant amount of expenses.

7. Kenneth Molberg. The Court finds that $50/hour is a reasonable rate for Mr. Molberg's services. Mr. Molberg is moderately experienced in civil rights litigation but has not played a prominent role in this action. Most of Mr. Molberg's time attributable to class issues was expended in 1976 and early 1977.

8. Steve Thorpe.[7] The Court finds that $65/hour is a reasonable rate for Mr. Thorpe's services. Mr. Thorpe has gained extensive experience since 1975 by assisting Mr. Barber with his civil rights and class litigation and more recently has been handling similar cases on his own. Most of Mr. Thorpe's time attributable to class issues in this action was expended in 1979 and 1980.

9. Law Offices of Huey Mitchell. A reasonable hourly rate for Mr. Mitchell is difficult to assess. Although Mr. Mitchell is not a specialist in class litigation and in many ways was the least efficient and most erratic of the attorneys on the case, he is an attorney of many years experience with a large portion of his practice devoted to civil rights. He represented eight of the named plain-

[7]Mr. Thorpe was also a law clerk for Mr. Barber prior to his formal association.

tiffs, filed the original lawsuits, and was lead counsel for all practical purposes in the early years of the litigation. After the Court's 1977 order appointing Howard Specter as lead counsel, however, Mr. Mitchell assumed a secondary role with much of his time being spent on the Union claims and in reviewing the discovery and motions filed by other attorneys. The Court is of the opinion that $50/hour was the top rate charged by attorneys with more than five years of experience for out of court time expended on complex business litigation in the years 1974-1976. Although Mr. Mitchell might not have commanded that rate in 1974, he has waited an inordinate amount of time for any return on his effort.[8]
The Court accordingly finds that $65/hour is a reasonable average rate for Mr. Mitchell's services.

Mr. Mitchell also requests reimbursement for time expended by persons other than himself whose credentials and, in some instances, identity are not supplied. With one exception, the Court has treated these persons as law clerks and has allowed their time at $5/hour. The Court is well acquainted with Mr. Don Fleming from other matters before the Court, however, and has always found him to be a diligent and capable attorney. Mr. Fleming's time is accordingly allowed at the requested $40/hour rate.

10. Walker, Hollingsworth & Jones (formerly Walker, Kaplan & Mays). The Court is firmly of the opinion that Mr. Walker's firm was needlessly associated. Although the Court does not question their ability, their contribution to class issues was minimal. They should, however, be compensated for any non-duplicative work performed that was of benefit to the class.

Mr. Walker is a distinguished civil rights attorney whose experience in major class litigation approaches that of Mr. Specter. Walker attended the class certification hearing and was requested by lead counsel to prepare a portion of the post-hearing brief. The

[8]Of the expenses due Mr. Mitchell, $7,500.00 represents a conditional grant from the Women's Law Center to be repaid as a loan in the event the class or the named plaintiffs prevailed in the suit. The out-of-pocket expenses actually carried by Mr. Mitchell amount to $2,678.82. The Court does not consider this an extraordinary burden.

Court finds that this effort was reasonable and necessary and that $70/hour is a reasonable rate for these services.

Mr. Kaplan's experience in civil rights litigation is considerable but not as extensive as that of Mr. Walker. Kaplan helped review and draft the pleadings upon which the class allegations were based. The Court finds that $60/hour is a reasonable rate for these services.

The Court finds that $50/hour is a reasonable rate for Mr. Jones' services. Mr. Jones is experienced in civil rights litigation but his role, much like that of Mr. Molberg, has been peripheral. His time on class matters was confined to 1978 and consisted primarily of his attendance at the Pittsburgh and Los Angeles strategy meetings.

11. Legal Assistants. With the exception of Mr. Specter, counsel submitting fee petitions have used the term "legal assistants" to describe all employees other than licensed attorneys who performed services on anything resembling a project basis. Reimbursement is requested at the rate of $25/hour for time expended by law clerks, paralegals, secretaries, and in one instance a photographer. The services performed included legal research, administrative tasks, copying, filing, deliveries, etc. The Court is convinced that $25/hour for any of these employees incorporates a profit margin on services that should be provided at cost. The Court is further convinced that law students are not necessarily qualified to do the work for which a certified paralegal has been trained, and vice versa. Research performed by law students is accordingly allowed at $5/hour. Administrative work performed by certified paralegal Elain Blatter is allowed at $20/hour; similar work performed by the other "paralegals" whose credentials have not been provided to the Court is allowed at $10/hour. Mr. Craig's photographer has been charged at $10/hour. Extraordinary clerical time, i.e., time in excess of one hour per project, has been allowed at $5/hour for copying and deliveries performed by Mr. Craig's employees.

12. Multipliers and Interest. The appointment of lead counsel

marks a turning point in the case. Since the entry of that order on April 19, 1977, the action has proceeded in an orderly and purposeful way. The Court, however, has taken adequate account of efficiency in determining the attorneys' hourly rates and declines the additional use of a multiplier. Since no attorney's fee is due under a contingent fee arrangement until the case is concluded, at least in the trial court, no pre-judgment interest is appropriate. *See, Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1321-1323 (5th Cir. 1978); *Gates v. Collier*, 616 F.2d 1268, 1280 (5th Cir. 1980) *per curiam on petition for rehearing*, No. 79 1844, slip op. 3041 (decided January 7, 1981).

C. Total Fees and Expenses.

In deciding whether to accept a case on a contingent fee basis, a plaintiff's attorney makes a highly subjective calculation of potential recovery less the amount of time and expense likely required to achieve it. Being limited to a percentage of the ultimate recovery, however, the attorney takes the risk that the award will not prove large enough to justify the time he has devoted to it - a risk he cannot unilaterally shift to the client. Even when it becomes apparent during the course of the suit that the probable recovery will not be profitable to the attorney, professional responsibility demands that the attorney accede to his client's wishes not to settle and see the matter through to its conclusion. The attorney may, of course, forfeit his right to share in the recovery or attempt to renegotiate his fee.

A new type of fee arrangement has developed with the advent of statutory attorney's fee awards. If the fees are imposed on the defendant over and above the plaintiff's recovery, the likelihood of a Phyrric victory for the attorney is greatly reduced. In the context of a class settlement, however, where fees are customarily deducted from a finite fund, it is the Court's responsibility to see that a just portion of the recovery goes to the class in the absence of a percentage limitation to allocate the risk of a disappointing recovery between the attorney and the client-class. Thus, independent of the reasonableness of the hourly rates, hours, and

expenses the Court must determine whether the resultant fee is commensurate with the benefit inuring to the class.

The Court finds that the charges for professional and paraprofessional time amount to $345,094.50 which is approximately 25% of the settlement fund. Time plus total expenses of $157,693.15 is 36.8% of the fund. In light of the quality of the attorney's work and the fact that 25% - 33% of the monetary recovery plus out-of-pocket expenses is the accepted and ordinary contingent fee where the case is settled before trial, the Court concludes that $502,787.65 is a reasonable attorney's fee.

II. Fairness of Settlement Proposal.

On March 3, 1980, defendant Bell deposited $1,125,000 in an interest bearing account to be distributed to the class with all accrued interest as soon as the settlement was approved. At this time the settlement fund totals approximately $1,366,000.00. An award of $502,787.65 in attorney's fees would leave in round figures $863,000.00 available for distribution. Under the allocation formula set out in the settlement proposal,[9] each unhired applicant would receive approximately $94.00 from the fund; each present or former employee would receive $8.63 per month worked during the time periods established for the respective subclasses, or a maximum of $760.00 for blacks and $664.00 for white females.

The Court holds that this is a fair and reasonable settlement, considering both monetary award and the affirmative relief. In

[9]Under the settlement, 85% of the fund remaining after fees and expenses is allocated to the class of present or former employees with individual awards to be based upon the following formula:

$$\frac{\#\text{ months worked by employee/claimant}}{\Sigma\ \#\text{ months worked by all employee/claimants}} \times \text{85\% of settlement fund after payment of fees and expenses}$$

The remaining 15% of the fund after fees and expenses will be divided equally among the unhired applicant class members who have filed claims as of the date of this opinion.

support of this holding, the Court summarizes the procedural history of the action and makes the following findings of fact and conclusions of law:

A. Procedural Summary of Case.

The first of these consolidated employment discrimination suits was filed on March 5, 1975, styled *Sarah Linda Parker, et al. v. Bell Helicopter Co.*, CA 4-75-61-E. Other actions by Bell employees were subsequently filed containing identical class allegations and differing only in the identity of the plaintiff(s) and the factual circumstances of their individual experiences at Bell. The actions filed by plaintiffs Parker, Ford, Jackson, Haynes, Eberly and Randall also contained charges of race and sex discrimination allegedly practiced by the Unions of which they were members. On April 21, 1978, the court conditionally certified a broad class of all blacks who were employed by or applied for work at any Texas facility of Bell Helicopter after November 29, 1972, as well as a class of all females who were employed by or applied for work at any Texas facility of Bell Helicopter after November 2, 1973. The Court denied certification of a class against the Unions but kept them in the suit as parties on the individual claims and as an active participant at the remedy stge in the event liability was established against Bell. The individual claims against the Unions were ultimately severed for separate trial and are still pending on the Court's docket.[10]

The case was originally set for trial for the week of July 25, 1977. This setting was vacated pending certification of the class, and a new schedule was entered setting trial for the week of September 10, 1979. Although an energetic program of discovery was conducted throughout 1977 and 1978, plaintiffs sought and obtained discovery of the veritable mother lode of Title VII proof in the months immediately preceding the 1979 setting. Plaintiffs obtained the computer tapes that recorded the entire past and

[10]See Order entered February 14, 1980.

present employee skills bank maintained by defendant Bell for its Texas facilities, portions of the affirmative action plans filed by Bell with the Department of Labor for contract compliance purposes, as well as a highly-confidential compensation analysis of non-union positions at Bell performed by an independent consulting firm (the "Hays Study"). In order to permit adequate analysis of this data, the trial date was continued to March 1, 1980, with a pre-trial conference scheduled for February 2, 1980.

Although trial of the case had been bifurcated into a liability stage and a remedy stage at the time the class was certified, the Court solicited the parties' preliminary opinions at the February 2nd pre-trial conference regarding further division of the liability stage into class and individual claims. Counsel estimated that trial of the entire liability case would take approximately six weeks and that trial of class liability issues alone would require at least two weeks. The Court took the bifurcation issue under advisement and urged the attorneys to make a good faith attempt to settle the case before resorting to a lengthy, expensive, and uncertain trial.

On February 29, 1980, counsel filed a joint motion for continuance representing to the Court that negotiations between lead counsel for the respective parties had produced a tentative settlement agreement but that additional time would be required to negotiate the details and resolve the individual plaintiffs' claims. The Court granted the continuance and instructed counsel to inform the Court no later than April 1, 1980, whether a complete settlement could be reached. On March 28, 1980, all counsel entered into a binding settlement that left the plaintiffs' individual claims to be resolved independently. This document was filed on April 18, 1980, attached to the joint motion for preliminary approval.

On April 10, 1980, several of the named plaintiffs moved to substitute civil rights attorney Charles Padorr as their counsel of record for the purpose of objecting to the settlement. On May 29, 1980, the Court defined a subclass of "objectors" and appointed Mr. Padorr as lead counsel for that subclass with authority to conduct discovery into the propriety of the negotiations and the fair-

ness of the settlement terms. By June 21, 1980, all of the named plaintiffs except Judith Anderson had dismissed their former attorneys and announced their opposition to the settlement. All of these plaintiff-objectors were represented by Mr. Padorr either by virtue of the May 29 order or their respective motions to substitute, with the possible exception of plaintiffs Mackey and Odom.[11] Judith Anderson continued to be represented by Mr. Mitchell. A hearing on the fairness of the settlement and reasonable attorney's fees was set for August 7, 1980, then continued to October 16, 1980.

With Mr. Padorr's adversarial participation, a notice of proposed settlement was drafted by the Court and approved on August 25, 1980. A copy of the notice and claim form mailed to class members and a copy of the verbatim publication notice are contaied in Attachment B. Claim forms, comments, and other correspondence from the notified class were directed to a post office box held in the name of the District Clerk. To protect the privacy of absent class members and assuage any fear of retaliation by Bell or the named plaintiffs, access to this correspondence was limited to counsel of record and their clerical assistants. Representatives of the parties opened the accumulated mail periodically. Defendant's counsel were instructed to prepare a report of the results, updated as of October 15, 1980, for use in calculating the potential individual awards.

The settlement hearing was held on October 16, 1980, as scheduled. The Court heard testimony for two days on the nature of the negotiations and the fairness of the settlement terms. Part of a third day was required to hear the issue of attorney's fees. All parties were given the opportunity to file post-hearing briefs on a schedule established by the Court. All briefs and replies having been received, the Court has carefully examined the settlement,

[11] These plaintiffs adopted an equivocal position that was never resolved for the Court or Mr. Padorr. While apparently looking to Mr. Padorr for legal guidance and acquiescing in his spokesmanship and advocacy, Mackey and Odom insisted that they had never formally retained him. Mackey and Odom were, therefore, added to the roster of attorneys as pro se plaintiffs.

the fee petitions, and the testimony presented at the hearing and makes the following findings of fact and conclusions of law.

B. Findings of Fact.

1. The notice of proposed settlement mailed or otherwise distributed to class members provided a materially complete and comprehensible description of the settlement terms and permitted an objective assessment of the benefits to be received in return for release of any covered discrimination claims. The range of attorney's fees and the resulting estimated value of a distribution unit suggested in the Notice proved to be an accurate prediction of the award that could be expected by a member of the employee class. Although an accurate estimate of attorney's fees did not significantly narrow the range of awards that could be expected by an unhired applicant, a high degree of uncertainty is inherent in awards to any large class of persons who can only be notified by publication. By describing the variables and leaving the unhired applicant to perform his own simple computations, the Notice provided the best estimates possible under the circumstances without distorting either the amount of the award or its predictability.

2. Absent class members had an adequate opportunity to examine the settlement critically and present their objections. They were put on notice that some of the named plaintiffs objected to the settlement and that they were also entitled to object. They the opposing positions. Class members were permitted to abide with the attorneys already in the case or to appear on their own behalf, with or without an attorney.

3. Actual notice was given to all absent class members whose names and last known addresses could be ascertained with reasonable effort.

4. The Court finds that notice by publication was the best notice practicable to the unhired applicants for whom names and reasonably current addresses could not be easily ascertained. The Court further finds that notices published on two occasions, two weeks

apart, in four newspapers of general circulation in the locales from which defendant Bell drew its workforce, were reasonably calculated to reach the unhired applicant class.

5. The initial mailing of the notice was completed on September 3, 1980. The notice was first published on September 1, 1980, and was published for a second time two weeks later.

6. Whatever the motives of the named plaintiff-objectors, their opposition to the settlement created an adversarial setting in which to weight the legitimate interest of the objecting class. The objecting class was represented by an able attorney who was afforded the means to raise and adequately develop his position on the adequacy of a settlement negotiated prior to any determination of liability.

7. Prior to September 1979, lead counsel Specter estimated defendant Bell's maximum exposure for back pay claims at thirteen million dollars, assuming plaintiffs succeeded in proving all of their factual allegations at trial and the Court accepted the formulas for estimating back pay most favorable to the class. Five million dollars was the conservative estimate, assuming compplete success on all factual issues but adoption of a less favorable formula for estimating back pay. In 1978, Specter made an offer of $5,000,000.00 in cash and affirmative relief, which offer was rejected by defendant Bell.

8. In late 1979, the named plaintiffs and their counsel were all justifiably confident of the strength of their case. Discovery had yielded a wealth of reliable data for use by plaintiffs' experts in sketching the statistical outlines of minority experience at Bell. At that time, lead counsel Specter placed the probable value of the case at $5,000,000.00. The result of the expert's analysis that became available in early 1980, however, did not support such high expectations. The dramatic statistical patterns of underutilization upon which a strong case for systematic discrimination is necessarily built simply did not emerge. In the face of Dr. Mann's characterization of the data as "not a particularly strong plaintiffs' case," lead counsel revised his estimation of probable recovery downward and continued to prepare for trial. Upon the Court's

urging at the pre-trial conference, Specter instituted earnest settlement negotiations with counsel for Bell that continued until the Friday before the trial was scheduled to begin.

9. The negotiations that resulted in the proposed settlement were begun after exceptionally thorough discovery of class issues had been completed. Negotiations were at arms length between mature attorneys of the highest ethical caliber, having access to virtually identical raw data. There is simply no rebuttal evidence of any weight to suggest that either attorney agreed to a settlement figure or settlement terms that were at variance with his bona fide professional judgment as to the strengths and weaknesses of his case, the expense of trial, and the likelihood of protracted appeals.

10. Trial of class liability issues alone could reasonably have been expected to add another $80,000.00 in attorney's fees and expenses to that already accrued by plaintiffs on March 1, 1980, with only a marginal chance of a recovery in the five million dollar range previously estimated by plaintiffs' lead counsel. In light of the expected rebuttal testimony from defendant's statisticians, there was a significant risk of failing to show liability on the major back pay issues.

11. If plaintiffs simply failed to persuade the trier of fact on the question of liability, there would be little hope of a reversal on appeal given the clearly erroneous standard for review of factual findings. On the other hand, if plaintiffs obtained a back pay award of three to five million dollars for the class, defendant Bell could be expected to appeal on a variety of legal issues, e.g., the propriety of certifying a class that included unhired applicants and/or the Amarillo facility, the necessity of showing discriminatory intent on Title VII claims not based on adverse impact, the Court's measure of damages, the validity of causes of action based on affirmative action plans, etc.

12. Counsel, with the assistance of expert statisticians, were in a far better position to judge the strengths and weaknesses of the class case against Bell than were the name plaintiffs or the absent class members.

13. The correspondence and the attorneys' fee petitions show that counsel consulted regularly and frequently with the class representatives throughout the case. Although the settlement negotiations that ensued following the February 1980 pre-trial conference and resulted in the tentative settlement on February 28, 1980, were conducted entirely between lead counsel for defendant and lead counsel for plaintiffs, all attorneys and a number of the named plaintiffs were aware that settlement negotiations were actually underway.

14. Associate counsel for plaintiffs were aware prior to March 1, 1980, of the serious evidentiary problems that afflicted the case. On February 29, 1980, lead counsel Specter drafted a letter to Mr. Stephen Shulman, counsel for defendant Bell, confirming their mutual understanding of the tentative settlement proposal. This letter was circulated to associate counsel for discussion with the named plaintiffs. During the early weeks of March, all named plaintiffs consulted their attorneys about the class settlement and authorized them to convey binding settlement offers to defendant Bell and to approve the class settlement on their behalf if accepted. In late March, defendant Bell rejected the plaintiffs' offers of settlement and extended modest counteroffers. Upon receiving a letter from Specter on March 26, 1980, describing Bell's counteroffer, plaintiff Mackey hastily called a meeting of the named plaintiffs for that evening, at which associate counsel Jim Barber agreed to appear. Angry and offended at what seemed to them small counteroffers, and fortified with a case of beer, the plaintiffs were ill disposed to listen to any explanation of the deficiencies of the statistical case against Bell. Posturing and wild talk took the place of reasoned analysis. At the close of the meeting, the plaintiffs voted to "reject" the settlement.

15. On or about March 28, 1980, defendant Bell agreed to waive its right to withdraw from the tentative settlement in the absence of binding settlements with the plaintiffs on their individual claims. Despite the vote taken two days before, two of the named plaintiffs, Dorothy Spears and Judith Anderson, had subsequently indicated their support of the settlement. On March 28, 1980, all counsel

signed the final Stipulation of Compromise and Settlement, subject only to approval by the Court.

16. The dominant theme of the discussions between named plaintiffs and their former attorneys from March 1, 1980, to April 10, 1980, was the inadequacy of the individual settlement offers made to the plaintiffs rather than the merits of the class settlement.

17. The named plaintiffs did not learn of the four year term of the Stipulation until after they had resolved to object to the settlement. The four year term, therefore, played no part in their decision to object.

18. Associate counsel had an adequate opportunity to examine the settlement terms criticlly on behalf of their clients and any potential subclasses prior to their signing the Stipulation of Compromise and Settlement on March 28, 1980.

19. Plaintiffs Mackey and Odom did not support their petition for fees and expenses with affidavits and contemporary time records as required by the Court's orders. The Court considers this a minor point however, in light of their sworn testimony at the settlement hearing. Even assuming that plaintiffs were entitled to recover for their time and personal, out-of-pocket expenses, it is apparent that some of the items listed in the petition were not actually expended by either Mackey or Odom and many of the dollar amounts given were no more than a speculative value assigned by these plaintiffs to the interest they had taken in the case.

20. Plaintiff-objectors opposed the settlement in bad faith, primarily to gain leverage in settling their individual claims against Bell at exorbitant figures. Although there were obvious difference of degree among the plaintiff-objectors, their opposition to the settlement was a product of disappointment and greed rather than a dispassionate evaluation of the settlement against the risks and expense of pressing on with the litigation.

21. For purposes of examining objections, the class may be broken down by facility into the following categories: (1) unhired applicants; (2) former employees; and (3) employees as

of March 1, 1980. There were an estimated 20,000 unhired applicants connected with the Fort Worth area facilities of which 1,330 responded by filing claims on or before March 2, 1981. There were approximately 10,000 unhired applicants connected with the Amarillo facility of which 50 responded. In the former employee category, 272 class members from the Fort Worth area and 98 from Amarillo responded. There were 1,187 class members employed in Fort Worth area facilities on March 1, 1980, and 319 in Amarillo.

Following a rather strenuous campaign by the named plaintiff-objectors to enlist dissenters from Bell's Fort Worth area employees, 242 objections were received representing about 20% of that segment of the employee class still working in the Fort Worth facilities on and after March 1, 1980. Sixty-two (62) former employees of Fort Worth area facilities, representing 23% of those responding, also objected. All but 12 of these objections, including those of former employees, were in the form of preprinted petitions circulated by the plaintiff-objects personally. Only one class member from Amarillo - a former employee - filed an objection. None of the 1,380 total unhired applicants filing claims identified themselves with the objectors.

The objections were directed entirely to the size of the settlement fund and the absence of job preferences, seniority rights and training programs in the affirmative relief. No objections from the class or from the plaintiff-objectors at the settlement hearing raised the allocation formula as an attack on the fairness of the settlement.

The Court finds that 20% - 23% is a significant, if not overwhelming, proportion of the employee class. However, the bulk of these objections were obviously prompted by contacts with the plaintiff-objectors. The handbill distributed at the gates of the Fort Worth area facilities (see affidavit of Howard Lowe filed October 10, 1980) is probably a conservative statement of the plaintiff-ojectors' position. Although it does not contain an egregious distortion of the monetary recovery that might be expected by an individual class member, its tone is decidely partisan and it omits

any reference to the expense of trial, to the possibility of a take nothing judgment, or to any of the factors relevant to a reasoned assessment. Since no rejoinder was undertaken by proponents and since none of the absent class members were in a position to assess the strengths and weaknesses of the statistical case against Bell independent of the plaintiff-objectors' militant portrayal, the Court is of the opinion that the objections are only as valid as the plaintiff-objectors' assertions.

22. Throughout this action plaintiffs' principal charge of adverse impact has been lodged against the educational and experience requirements contained within defendant's job specifications. Plaintiffs contend that these are unnecessary barriers to hiring and promotion of blacks and women. Defendant counters that blacks and women are not adversely affected to a significant degree and that, regardless of adverse impact, the technical nature of the industry justifies such qualifications. The Court finds that these issues would have been hotly disputed at trial with sharply conflicting testimony from statistical experts drawing their opinions from the same basic data and seeking to impeach their opponents' analyses to their own purposes. Defendant Bell was also prepared to offer extensive expert testimony on the demands and standards of the aircraft and defense industry.[12] The settlement allows the parties to avoid an all-or-nothing confrontation of unpredictable outcome by submitting the question of validity to expert consultants, selected by agreement between counsel, rather than to the Court. The recommended job specifications would then be submitted to the defendant Unions for approval. Even though it is conceivable that the Unions would reject the recommendations in favor of maintaining invalid requirements, the Court finds this a remote possibility given the evidentiary value such an act would

[12]In December 1979, the Court accompanied counsel for the parties on a tour of Bell's Fort Worth area facilities. Without deciding the issue the Court will note its observation that the construction of aircraft is more technical and requires a higher degree of skill and knowledge than ordinary assembly-line work.

have in any present or future litigation against these Unions.[13] Furthermore, defendant Bell would be risking almost certain liability for discrimination since March 1, 1980, if, having the power, it failed to amend job requirements shown to be invalid by the consultant's report.

23. Defendant Bell had a thorough compensation analysis of its non-union positions performed by an independent consultant in 1979 (the Hays Study). The Stipulation clearly requires Bell to adopt an ongoing policy extending beyond the four year term of the contract itself under which the company will review the validity of job specification for all positions at three year intervals for the express purpose of amending those specifications if they are found to be invalid. The results of the first such review will be provided to lead counsel Specter. The results of subsequent triennial reviews would be available to any aggrieved person by way of discovery.

24. Plaintiffs were prepared to show at trial that various programs held out by defendant Bell as examples of its equal employment efforts were, in fact, mere windowdressing; that they were never fully operative and were neither publicized nor conscientiously utilized by defendent. Plaintiffs alleged and expected to prove the following facts in support of their position that defendant Bell was indifferent to and intent upon evading its equal employment obligations: (1) that recruitment was intermittant, perfunctory and limited to a few trade schools and colleges, especially at Amarillo; (2) that minorities and females were not informed of or encouraged to complete the Employee Skills Profile Questionnaire, that no consistent effort was made to keep the information current, and that managerial and supervisory personnel with hiring authority were not instructed or required to consult the Employee

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[13]The individual actions against the Unions brought by a number of the named plaintiffs are still pending. Discovery in these actions is far from complete and it is not yet clear whether any of the attorneys originally engaged to prosecute the suit will continue to represent the plaintiffs. The Court estimates that these actions will not be ready for trial before the consultant's recommendations have been presented to the defendant Unions for approval.

Skills Profiles and, in fact, did not do so; (3) that the personnel in charge of affirmative action and/or equal employment opportunity were supernumaries with no real authority and with virtually no input at upper management levels; (4) that management has not made compliance with equal employment goals a positive criteria in evaluating the performance of its supervisory personnel; (5) that management makes no significant effort to determine when, whether and how discrimination is taking place or to emphasize equal employment goals to its supervisors. The Court finds that each provision for affirmative relief described in the Stipulation is responsive to one or more of the complaints enumerated above.

25. The Court finds that the position of Equal Opportunity Coordinator will be expanded and upgraded under the settlement to provide better access to upper-level management and better implementation of defendant's affirmative action plans. The new coordinator will maintain a skills pool of identifiable blacks and women to be reviewed periodically and consulted as a matter of course for hiring and promotion purposes.

26. The Court is of the opinion that the following techniques provided in the Stipulation are basic to non-discriminatory utilization of qualified minorities and women in the face of subjective prejudice at the supervisory level: (1) requiring written reasons for rejecting black and female applicants and/or candidates for promotion; (2) maintaining a list of currently available supervisory jobs; (3) employing properly trained interviewers and recruiting personnel; (4) required participation by all supervisors in a training program to acquaint them with equal opportunity goals, the operative procedures for meeting those goals, and the supervisor's responsibility for serving them; (5) maintenance of records and periodic reports to an officer with policymaking authority.

27. The Court agrees with plaintiff-objectors that the Stipulation does not provide for the following relief: (1) specific action upon the quarterly report made by the EEO Coordinator; (2) informing rejected applicants or candidates for promotion of the reasons for their rejection; (3) specific adverse personnel action against supervisors with poor evaluations in the equal employment

area; (4) posting of the list of available supervisory positions on bulletin boards in work areas; (5) maintenance of a list of currently available managerial positions; (6) hiring quotas, promotional preferences, or training programs for blacks and women desiring to enter supervisory or managerial positions; (7) written reasons for adverse personnel actions other than refusal to hire or promote; and (8) validation of tests or lines of progression.

28. Contrary to plaintiff-objectors' contention, the Court finds that the Stipulation does provide for review as a matter of course of the applications and Employee Skills Profile Questionnaire maintained by the EEO Coordinator for the purpose of referring qualified blacks and females for consideration along with other applicants for employment and/or promotion. The Court further finds that the Stipulation requires corrective action if recruiting and interviewing personnel are discovered to be unqualified or lacking in training.

29. The Court finds that the affirmative relief described in the Stipulation will cost approximately $1,000,000.00 to implement and maintain and will be of substantial value to the class.

30. The Court finds that the cost of compliance with the affirmative action provisions of the settlement plus the amount remaining for distribution after deduction of attorneys' fees and expenses yields a net settlement value of $1,863,000.00. In light of the strengths and weaknesses of plaintiffs' case, the expense of trial and the likelihood of protracted appeals, the Court finds that this is a fair, reasonable, and adequate settlement.

C. Conclusions of Law.

1. Settlement is the preferred method of resolving class litigation based upon employment discrimination. *Miller v. Republic National Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975). Nevertheless, because of the fact that a class settlement is negotiated in the absence, and often without the knowledge, of most of the individuals whose rights are being compromised, Rule

23(e) requires court approval of the settlement and prescribes certain procedural protections for the absent class members, including notice under the standards of *Mullane v. Hanover Bank & Trust Co.*, 33 U.S. 306 (1950), 70 S.Ct. 652 (1950) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974) and an opportunity to object prior to approval. In the final analysis, the Court acts as a fiduciary to the absent class members and must examine each settlement thoroughly and critically to determine whether it is fair and reasonable to each distinct segment of the class. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978) [hereinafter *"Pettway IV"*]; *Piambino v. Bailey*, 610 F.2d 1306, 1327-1329 (5th Cir. 1980).

2. The notice must contain a description of the class and a fair and neutral recital of the terms of the settlement; must notify class members of their right to object, and must give them a reasonable time in which to do so. *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975); *Oswald v. McGarr*, 620 F.2d 1190 (7th Cir. 1980); *Miller v. Republic National Life Ins. Co.*, 559 F.2d 426 (5th Cir. 1977). Where attorneys fees are to be fixed by the Court, the notice must advise the class of that fact and provide an estimate of the proposed fees. *Piambino*, 610 F.2d at 1328.

3. Where the monetary award to individual class members is subject to a number of variables that can themselves only be estimated, the better practice is to provide a description of the variables and the formula for calculating the awards rather than giving a speculative dollar figure. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977).

4. The class was given a reasonable time in which to object to the terms of the settlement. *Miller*, 559 F.2d at 429-430.

5. The Court concludes that notice was adequate in all respects.

6. Where class representatives find themselves divided over the settlement or unnamed plaintiffs appear and seek to oppose the compromise put forward by the representative, the opponents should be permitted the opportunity to adequately develop the

basis for their opposition by obtaining separate counsel, conducting discovery, and presenting their position in an evidentiary hearing, if desired. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2nd Cir. 1974); *Saylor v. Lindsley*, 456 F.2d 896, 901 (2nd Cir. 1972); *Pettway IV*, 576 F.2d at 1169. Although the scope and manner of any such discovery may be limited to prevent undue expense, abuse of the defendant, or betrayal of the plaintiffs' case, *see Grinnell*, 495 F.2d at 463-464, matters deemed relevant should include the conduct of the settlement negotiations, the areas of potential conflict of interest between the class and its representative or counsel, and the extent and nature of the data upon which the proponents relied in arriving at the settlement.

7. The threshold inquiry is whether there is a sufficient basis in the record to form an educated opinion. Where settlement is reached on the eve of trial after years of active litigation in which a voluminous file has accumulated and comprehensive discovery has been completed, there will usually be an adequate basis for the "balancing of likelihoods" that the court must undertake. *Levin v. Mississippi River Corporation*, 59 F.R.D. 353, 361 (S.D.N.Y. 1973) *aff'd sub nom. Wesson v. Levin*, 486 F.2d 1398, *cert. denied* 414 U.S. 1112, 94 S.Ct. 843 (1973); *Flinn v. FMC Corporation*, 528 F.2d 1169, 1173 (4th Cir. 1975); *Saylor v. Lindsley*, 456 F.2d 896, 901 (2nd Cir. 1972). In this case, the Court also had the advantage of an organized and capably represented group of objectors who, if they did not succeed in impugning the settlement, at least left little reason to suspect material gaps in the record.

8. In determining whether the settlement is fair and reasonable, the Court is neither required nor permitted to adjudicate ultimate issues of fact and law since the very purpose of the settlement is to avoid a trial. *Grinnell*, 495 F.2d at 462; *Greenspun v. Bogan*, 492 F.2d 375, 381 (1st Cir. 1974); *Pettway IV*, 576 F.2d at 1214. What the Court must do is assess the business judgment reflected in the settlement. *Protective Committee v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157 (1968); *Young v. Katz*, 447 F.2d 431, 433

(5th Cir. 1971). In making that appraisal, the Court should consider (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense and likely duration of litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members. *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); *Pettway IV*, 576 F.2d at 1214-1219. In the absence of fraud or collusion, the most important of the above criteria is the probability of successon the merits. *Flinn v. FMC Corporation*, 528 F.2d 1169, 1172 (4th Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975); *Grinnell*, 495 F.2d at 455.

9. The expert opinion of experienced counsel who have conducted full discovery into the facts and are familiar with the requisites of proof in a court of law is entitled to great weight in determining the adequacy of a settlement, absent a showing that counsel's judgment was clouded in some material way. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *Pettway IV*, 576 F.2d at 1215; *Saylor v. Lindsley*, 456 F.2d at 900-901. Lead counsel's credentials, his exemplary conduct before this Court, and the concurrency of all former counsel for plaintiffs generally recommends his assessment. More importantly, however, his evaluation is consistent with the file, with the course of discovery, and with the statistical analyses of plaintiffs' own expert. Although counsel for objectors was given access to the fruits of all previous discovery, filed and unfiled, as well as all work product shown to defendant Bell during the negotiations, objectors adduced no persuasive evidence to show fraud or collusion or to otherwise impeach counsel's evaluation of the settlement given the weaknesses of the case.

10. The professional obligations of lead counsel for the class to the class representative constitute a hybrid of the ordinary attor-

ney-client relationship. The nature of this relationship and the appropriate way of handling a serious difference of opinion between counsel and the representative over the interests of the class has been cogently summarized by the eminent Judge Friendly writing for the court in *Saylor v. Lindsley,* 456 F.2d at 901:

> We are willing to go along with the appellees and hold, despite the seeming incongruity, that the assent of the plaintiff (or plaintiffs) who brought a derivative stockholder's action is not essential to a settlement; a contrary view would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interest of the [class]. On the other hand. . . we are not willing to go to the other extreme and accept the view that the attorney for the plaintiff is the *dominus litus* and the plaintiff only a key to the courthouse door dispensable once entry has been effected. The attorney remains bound to keep his client fully informed of settlement negotiations, to advise the client before signing a stipulation of settlement on his behalf, and, if the client has objected, to inform the Court of this when presenting the settlement, so that it may devise procedures whereby the plaintiff, with a new attorney, may himself conduct further inquiry if so advised.

The Court of Appeals for the Fifth Circuit has adopted this view which essentially requires the Court upon being notified of a conflict to reassure itself of the continuing adequacy of the representative before bowing to the traditional allocation of authority that would obtain between an attorney and his individual client under the Code of Professional Responsibility. *Pettway IV,* 576 F.2d at 1176-1178; *Kincaid v. General Fire & Rubber Co.,* 635 F.2d 501, 508 (5th Cir. 1981).

11. The Court concludes that lead counsel behaved appropriately in negotiating the tenative settlement as spokesman for the class, immediately advising the named plaintiffs and associate counsel of its terms by letter, and ascertaining the named plaintiffs'

reaction to the settlement before presenting it to the Court by their Joint Motion for Preliminary Approval on April 18, 1980. It would be a gross distortion of the events to suggest that counsel attempted to conceal or even delayed notifying the Court of the plaintiff-objectors' dissent once it became irreconcilable.

12. Plaintiff-objectors misconstrue *Pettway IV* in citing it for the proposition that all settlements, regardless of the stage in the litigation at which they are reached, must allow class members to reject their share of the settlement and attempt to prove a greater amount of individual damages in a later proceedings. In *Pettway III,* 494 F.2d 211 (5th Cir. 1974), the trial court's finding of liability against the defendant had been affirmed, but the denial of back pay had been reversed and remanded with detailed instructions regarding the calculation of pay back awards. 949 F.2d at 260-264. The court then suggested the following method of determining and allocating class-wide back pay as an alternative to making a multitude of individual calculations:

> In other words, the total award for the entire class would be determined. At that point individual claims would be calculated on pro rata shares for those workers of similar ability and seniority claiming the same position, possibly eliminating the necessity of deciding which one of many employees would have obtained the position but for the discrimination. Claimants dissatisfied with their portion of the award could be allowed to opt out in order to prove that they were entitled to a larger portion.

494 F.2d at 263, n. 154. The back pay judgment entered by the district court in response to the mandate of *Pettway III,* however, required certain class members either to cash their back pay checks and thereby release the defendant from all future liability or to opt out of the litigation altogether and bring new lawsuits to collect their back pay. In *Pettway IV,* the Fifth Circuit found that this procedure put dissenting class members in an untenable predicament and held that they could not be required to opt out of the

litigation but must be afforded the opportunity to prove larger damages, if at all, within the same proceeding. 576 F.2d at 1219-1222. This holding is inextricably bound up in the lengthy procedural history of *Pettway* and cannot be read as a general requirement applicable to settlements reached before any determination of liability. *Kincaid v. General Fire & Rubber Co.*, 635 F.2d 501, 507 n. 10 (5th Cir. 1981).

13. Although neither absent class members nor the class representatives have an absolute right to opt out of a settlement to which they object, a settlement that allows the named plaintiffs to pursue their individual claims separately may be approved as fair and reasonable under the proper circumstances. *Kincaid*, 635 F.2d at 506-508; *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981). Of course, any provision that accords different treatment to the representatives than to the class must be examined closely to guard against bartering of the class interests in return for a premium. *See, Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973); *Sagers v. Yellow Freight Systems, Inc.*, 68 F.R.D.686(N.D.Ga. 1975) *aff'd.* 529 F.2d 721 (5th Cir. 1976); *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 76 F.R.D.173, 181-182 (S.D.N.Y 1977). Since the absent class members make no financial contribution to the litigation and bear none of the risks or personal discomfiture involved in openly suing one's employer, the named representatives can reasonably be allowed to prove greater damages so long as the special provision does not cast doubts upon their adequacy and is not at the direct expense of the other victims of discrimination, especially where liability has already been established. *See, e.g., Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 64 (5th Cir. 1974); *Bray v. Lee*, 337 F.Supp. 934 (D. Mass. 1972). The plaintiff-objectors' vehement opposition to the settlement obviates much of the Court's fiduciary concern that the representative may acquiesce in an unfair or inadequate settlement in return for preferential treatment. Nonetheless, the severance provision itself is designed to minimize any conflict with the class. The fund available for distribution to the class will not be

reduced by any monetary damages awarded to the named plaintiffs or by the expense of pursuing them. Unlike the absent class members, the named plaintiffs will be put to their proof before any recovery is had. Because of the nature of the affirmative relief provided in the Stipulation, no promotions won by the named plaintiffs will place them in direct competition with the absent class members. The Court, therefore, concludes that severance of the named plaintiffs' individual claims is not unfair to the class and does not affect the adequacy of the settlement. The Court further concludes that no general opt out provision is necessary to protect the interests of the absent class since they have been admirably represented by class counsel.

14. Although negotiations concerning the amount of an attorney's fee award might be allowed if damages have been approved and the fees are not to be deducted from the damage fund, *Prandini v. National Tea Company,* 557 F.2d 1015, 1021 (3rd Cir. 1977, negotiated fee settlements are disfavored as a rule, *Piambino v. Bailey,* 610 F.2d 1306 (5th Cir. 1980). Attorney's fees and expenses may properly be paid from the finite fund available to the class so long as the class is notified of the proposed fees and the amount is either determined by the Court or otherwise approved as reasonable under the *Johnson* criteria.

16. Despite their access to the file and to compulsory discovery, objectors adduced no evidence of any weight to rebut proponents' prima facie showing that the class case was not strong enough to demand larger monetary awards or additional affirmative relief. Nor did objectors introduce any persuasive evidence to show that the affirmative relief described in the Stipulation is identical or equivalent to programs already in existence at defendant Bell. After careful consideration of the file, the testimony and exhibits from the settlement hearing, the fee petitions, and the arguments of counsel, the Court concludes that proponents have met their burden of showing that the proposed settlement is fair and reasonable under the circumstances.

The settlement is accordingly APPROVED and the class claims against defendant Bell are hereby DISMISSED with

prejudice to refiling the same. Defendant is instructed to inform the Court by letter within 15 days after all checks have been mailed of the final calculation of individual awards, including (1) the total settlement fund distributed; (2) the total number of claimants in each category; and (3) the maximum award made in each category.

The severed individual claims shall remain consolidated until further order of this Court.

Signed this 10th day of March, 1981

ELDON B. MAHON

UNITED STATES DISTRICT JUDGE

LITMAN, LITMAN, HARRIS & SPECTER

Attorneys	# Hours	Rate	Fees	
H. Specter	1,480.0	$125/hr.	$185,000.00	
M. Buchwach	782.8	75/hr.	58,710.00	
B. Troiano	92.1	50/hr.	4,605.00	
D. MacCallum	93.4	40/hr.	3,736.00	
				$252,051.00
Paralegal				
E. Blatter	1,257.0	20/hr.	25,140.00	25,140.00
			Time	$277,191.00
			Expenses	134,854.56
			Total Fee	$412,045.56

LAW OFFICES OF JAMES C. BARBER

Attorneys	# Hours	Rate	Fees	
J. Barber	231.5	$ 85/hr.	$19,677.50	
K. Molberg	70.0	50/hr.	3,500.00	
S. Thorpe	74.0	65/hr.	4,810.00	
				$ 27,987.50
Law Clerks				
E. Thornberg	19.5	5/hr.	97.50	
S. Thorpe	10.0	5/hr.	50.00	14;7.50
			Time	$28,135.00
			Expenses	2,608.37
			Total Fee	$ 30,743.37

ATTACHMENT "A"

LAW OFFICES OF WALLACE CRAIG

Attorneys	# Hours	Rate	Fees	
W. Craig	146.9	$75/hr.	$11,017.50	
Legal Assistants				
B. Green	14.2	10/hr.	142.00	
L. McLeod	50.0	10/hr.	500.00	
J. Bentley	40.0	10/hr.	400.00	
J. Kelley	5.5	5/hr.	27.50	
M. Fischer	4.0	5/hr.	20.00	
				$ 1,089.50
Copying & Deliveries:	85.7 hrs. at $5/hr.			428.50
			Time	$12,535.50
			Expenses	$ 7,501.40
			Total Fee	$20,036.90

LAW OFFICES OF HUEY MITCHELL

Attorneys	# Hours	Rate	Fees	
H. Mitchell	319.8	$65/hr.	$20,787.00	
Don Fleming	24.5	40/hr.	980.00	
				$21,767.00
Legal Assistants:	42.7 hours at $5/hr.			213.50
			Time	$21,980.50
			Expenses	10,178.82
			Total Fee	$32,159.32

WALKER, HOLLINGSWORTH & JONES
(formerly Walker, Kaplan & Mays)

Attorneys	# Hours	Rate	Fees	
J. Walker	28.75	$70/hr.	$ 2,012.50	
P. Kaplan	14.00	60/hr.	840.00	
H. Jones	48.00	50/hr.	2,400.00	
				$ 5,252.50
Expenses:	Walker	$1,900.00		
	Kaplan	0.00		
	Jones	650.00		2,550.00
			Total Fee	$ 7,802.50

TOTAL TIME	$345,094.50	(25% of settlement fund)
TOTAL EXPENSES	157,693.15	
TOTAL FEES	$502,787.65	(36.8% of settlement fund)

ATTACHMENT "A" (cont'd)

APPENDIX C

"Order Amending Memorandum Opinion And Order Of March 10, 1981" of the United States District Court for the Northern District of Texas, Fort Worth Division

Dated April 10, 1981

SARAH LINDA PARKER, ET AL., Individually and on Behalf Of All Other Persons Similarly Situated	§	
VS.	§	CIVIL ACTION NO. CA4-75-61-E (Conditionally Consolidated)
BELL HELICOPTER COMPANY, A Subsidiary Division of TEXTRON, INC., ET AL	§	

ORDER AMENDING MEMORANDUM OPINION AND ORDER OF MARCH 10, 1981

On March 10, 1981, this Court entered its Memorandum Opinion and Order approving the Stipulation of Compromise and Settlement submitted on behalf of the class of plaintiffs described therein and defendants Bell Helicopter Company and Textron, Inc. The Court hereby AMENDS that Order in the following particulars:

I. Clerical Errors.

The first sentence under heading "II. *Fairness of Settlement Proposal.*" on page 13 of the Memorandum Opinion and Order is hereby amended to read as follows:

On March 3, 1980, defendant Bell deposited $1,250,000 in an interest bearing account to be distributed to the class with all accrued interest as soon as the settlement was approved.

The last sentence on page 15 of the Memorandum Opinion and Order, carrying over to page 16, is hereby amended to read as follows:

Plaintiffs obtained the computer tapes that recorded the entire past and present employee skills bank maintained by defendant Bell for its Texas facilities, portions of the affirmative action plans filed by Bell with the Department of Labor for contract compliance purposes, as well as certain data underlying a highly-confidential compensation analysis of non-union positions at Bell performed by an independent consulting firm (the "Hays Study").

II. Substantive Amendments.

A. Settlement Fund Plus Accrued Interest.

The Court arrived at an estimate of the fund available for distribution to the class and of the maximum awards that could be expected by individual class members using the figure of $1,366,000 as the minimum amount available for distribution as of the date of the opinion. The parties have now informed the Court that the settlement fund will actually be in excess of $1,440,000.00 at the time of distribution. Since this variance, if anything, enhances the Court's determination that the settlement is fair, adequate and reasonable to class members, amendments in the body of the Memorandum Opinion and Order to reflect different calculations are unnecessary.

B. Post-Settlement Attorney's Fees.

The Court's Order of March 10, 1981, omitted any award to Litman, Litman, Harris & Specter for work necessarily performed subsequent to October 24, 1980, the latest date for inclusion in the October 28, 1980 Supplement. Furthermore, no consideration was given to work to be performed in implementing the affirmative relief provided in the Stipulation, e.g., selecting the independent consultant to validate the job requirements for union positions. Since any waiver of further supplementation was obviously predicated upon the anticipated award of a multiplier, the Court will permit supplementation to show work done since October 24, 1980. It further appears that denial of an award for future work would be penny wise but pound foolish for the class. The validation process is the heart of the affirmative relief conceded by defendant Bell, and joint selection of the consultant is the major practical device for assuring confidence in the results. REquiring class counsel to perform these functions wholly without compensation would jeopardize enforcement of one of the most valuable provisions of the settlement.

The Court accordingly AMENDS the fee award to Litman, Litman, Harris & Specter, previously set forth in Attachment A of the March 10, 1981, Order, to add the following:

1. Fees and expenses incurred by Litman, Litman, Harris & Specter from October 24, 1980, to the date of this amendment, as detailed in the affidavit filed on March 26, 1981; and

2. Allowance for 50 hours of attorney's time at $125/hour plus $1,500 for expenses to be incurred in overseeing implementation of the affirmative relief provided in the Stipulation.

The amended fee award to lead counsel's firm and amended totals are summarized in an attachment to this Order.

C. Interest.

The Court remains convinced that the statutory pre-judgment interest ordinarily payable on liquidated amounts is inappropriate for an award of attorney's fees. As pointed out in the Memorandum Opinion and Order, there is even some question as to whether awards of post-judgment interest on attorney's fee will ultimately be permitted in this Circuit. *Carpa, Inc. v. Ward Food, Inc.*, 567 F.2d 1316, 1321-1323 (5th Cir. 1978); *Gates v. Collier*, 616 F.2d 1268, 1280 (5th Cir. 1980) *per curiam on petition for rehearing* 636 F.2d 943 (1981). However, the Court is persuaded that a *pro rata* sharing in interest accrued on a settlement fund that was obtained through the efforts of counsel is a reasonable and equitable method of allocating benefits between the client class and its attorneys, fully consistent with *Johnson* criteria.

Defendant has informed the Court that, assuming cancellation of the six month certificate of deposit on the date of maturity, the settlement fund plus interest accrued as of October 24, 1980, equalled $1,351,811.54. It is accordingly ORDERED that a pro rata portion of the interest accrued on the settlement fund of $1,351,811.54 from October 24, 1980, until the date of actual distribution of attorney's fee awards shall be awarded to plaintiffs' respective counsel according to the following formula:

$$\text{Interest since October 24, 1980} \times \frac{\text{Attorney's Fee Award From Attachment A, As Amended}}{\$1,351,811.54^{*}}$$

*Defendant may correct for deduction of any penalties incurred for premature withdrawal of funds.

The remaining interest shall be distributed to class members in accordance with the Stipulation.

All other amendments are specifically DENIED. Judgment shall be entered accordingly.

Signed this 10th day of April, 1981.

ELDON B. MAHON

UNITED STATES DISTRICT JUDGE

LITMAN, LITMAN, HARRIS & SPECTER

Attorneys	# Hours	Rate	Fees	
H. Specter	1,581.1	$125/hr.	$197,637.50	
M. Buchwach	817.5	75/hr.	61,312.50	
B. Troiano	92.1	50/hr.	4,605.00	
D. MacCallum	98.4	40/hr.	3,936.00	
				$267,491.00
Paralegal				
E. Blatter	1,294.6	20/hr.	25,892.00	
				25,892.00
			Time	$293,383.00
			Expenses	138,865.78
			Total Fee	$432,248.78

Total Time	$361,286.50	(27% of fund)
Total Expenses	161,704.37	
Total Fee	$522,990.87	(38.7% of fund)

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that true and correct copies of the foregoing Writ of Certiorari have been served upon all counsel of record, by forwarding same by United States mail, first class, postage prepaid, this the 18th day of May, 1982, addressed to:

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